In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 927

SALVATORE GRANELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The memorandum opinions of the district court (Pet. 52–59, 60–66) are not officially reported. The opinion of the court of appeals (Pet. 67–70) is reported at 403 F. 2d 337.

JURISDICTION

The judgment of the court of apepals (R. 507)[1] was entered on October 18, 1968. The petition for a writ of certiorari was filed on January 10, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." references are to the transcript of record certified to this Court.

QUESTIONS PRESENTED

1. Whether petitioner was entitled to a hearing to determine whether the government's destruction of the original recordings of an electronic surveillance of his co-defendant deprived petitioner of a fair trial.

2. Whether petitioner was deprived of a fair trial because the government did not voluntarily produce a partial inventory of records seized from a third party.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner and a co-defendant, Levine, were convicted of violations of the income tax laws. The convictions were affirmed (365 F. 2d 990) and this Court denied certiorari (386 U.S. 1019).[2]

In the government's opposition to the petition for certiorari, the Solicitor General stated (No. 750, O.T. 1966, pp. 16–21) that premises in which Levine had an interest had been the subject of an illegal electronic surveillance during which conversations were overheard concerning two other federal offenses for which Levine was being tried; that neither those two cases, nor the overheard conversations, had any connection with the present income tax case; that Levine's counsel would be given an opportunity to review the logs; but that no rights of petitioner Granello had been invaded by the electronic surveillance.[3]

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[2] There was a dissenting opinion by Mr. Justice Douglas, and another by Mr. Justice Fortas, in which the Chief Justice concurred.

[3] After the denial of the petition for certiorari the logs were turned over to Levine's counsel and his convictions on the two

On November 13, 1967, petitioner, Granello, filed a motion in the district court under 28 U.S.C. 2255 seeking to have his conviction vacated. (R. 267.) In an affidavit (R. 269–277) attached to the motion petitioner alleged that he had made telephone calls to Levine during the period of the electronic surveillance, and that the prosecution had obtained the name of a defense witness as a result of overhearing a phone call between Levine and his attorney, Irwin Germaise. Petitioner also attached an affidavit of Levine which alleged that the logs contained conversations between himself and others relating to the present tax case (R. 279–280). Germaise also submitted an affidavit which alleged that the defense witness whose name was recorded in the logs had thereafter been harassed by the Internal Revenue agents, and further alleged that the government had withheld an inventory of records seized from Lowell M. Birrell which would have been helpful to the defense (R. 280–291).

Te district court, after hearing argument for two days (R. 1–142), handed down a preliminary decision (Pet. 52–59). It directed the government to examine the Birrell inventory and report whether it contained any mention of a ledger and certain check books which the defense had sought to have produced during the trial. (Pet. 52–53.) Furthermore, in accordance with the opinion of Mr. Justice Fortas dissenting from the original denial of certiorari, it directed the government

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unrelated cases were ultimately set aside. (Pet. 55; R. 305–309.) Levine made no application in the courts below for relief from his conviction under the present income tax charge. (Pet. 55, footnote.)

to make the same disclosure of the logs of overheard conversations to petitioner Granello as had been made to Levine. (Pet. 53–59.)[4]

After having examined the logs, petitioner filed a supplemental motion to vacate his conviction (R. 322–323). As grounds for relief, petitioner relied on the fact that the prosecutor had admitted (Pet. 43) that the original recordings of the electronic surveillance had been destroyed, and the averments of Levine and his attorneys that the logs previously furnished to Levine contained references to petitioner Granello and conversations concerning the present income tax case which did not appear in the logs as furnished to petitioner (R. 328, 329, 366–367, 439–444). Petitioner also sought a hearing to examine those who had monitored and transcribed the conversations overheard in Levine's premises, to determine whether some of the overheard conversations had not been recorded, or, if recorded, had not been transcribed. (Pet. 62.)

The district court refused to vacate petitioner's conviction. (Pet. 60–66.) The court described the scope of the disclosure granted to petitioner (Pet. 60–61):

> By a memorandum dated December 14, 1967, I directed the Government to permit examination by Granello of three categories of material, all parts of the log concerning (1) him, (2) his co-defendant Levine, or (3) the handling of the trial of this case. This was accomplished by having the Government first peruse the logs and delete material that was not to be turned over. *I then reviewed the complete log to make sure that all required material would be turned over.*

[4] See note 3, *supra*.

> All of the material within the direction was turned over to Granello. The name "Granello" appeared several times in the transcript but never in a context that indicated any connection with the instant case. Nevertheless the transcripts turned over to Granello included all parts thereof where his name was mentioned. All portions dealing with Levine were also turned over, though none of these indicated any connection with the instant case, either. No material in the third category was found [Emphasis added].

As to the Birrell inventory, the court said that everything which petitioner sought to reach by use of the inventory had been turned over to him. (Pet. 61.) As to the destruction of the tapes and the incompleteness of the logs, the court held that petitioner had no standing to complain since only Levine's rights had been invaded by the overhearings. (Pet. 62–66.)

The court of appeals affirmed (Pet. 67–70). In view of the fact that the issue of standing was pending before this Court in *Alderman* v. *United States* (No. 133, O.T. 1967, reargued October 8, 1968), it based its holding on the following grounds (Pet. 70):

> While we do not disagree with the district court's views about standing, we thus prefer to rest our affirmance on the basis that, particularly in light of the Solicitor General's representation to the Supreme Court that "neither the existence of the surveillance nor any information overhead was communicated in any manner to the Internal Revenue Service or to government counsel who prosecuted this case," Granello did not raise a sufficient question con-

cerning the incompleteness of the logs to require that the agents be called.

ARGUMENT

Petitioner, having examined the logs, found nothing to support his allegations that they contained material relevant to his income tax trial. His sole contentions now are (1) that he should have been allowed to examine the monitoring agents to ascertain whether relevant material had been omitted from the logs, and (2) that the Birrell inventory was unfairly withheld from him at the trial.

1. Petitioner was not entitled to examine the monitoring personnel to determine whether he had been furnished complete transcripts of matters relating to himself or to Levine. As noted by the courts below (Pet. 62–63, 70), the affidavits submitted by petitioner, to support his claim that the logs furnished to him failed to include matter contained in the logs shown to Levine, were largely conclusory and repetitive. When Levine executed a supplementary affidavit essaying to state with particularity what he thought he had seen concerning petitioner in the logs furnished to him in Florida (R. 439–440), he merely recited matters actually appearing in the logs furnished to petitioner but under a different date (Pet. 62, 70). Petitioner's charge that the destruction of the original tapes prior to conclusion of appellate proceedings is unprecedented (Pet. 5–6) fails to note that erasure of tapes after they have been transcribed has been a routine feature of the eavesdropping cases which began with *Black* v. *United States,* 385 U.S. 26, 27;

United States v. *Balistrieri* (C.A. 7), decided November 7, 1968 (68–2 U.S.T.C., par. 9641); *United States* v. *Taglianetti,* 274 F. Supp. 220 (D.R.I.), affirmed, 398 F. 2d 558 (C.A. 1), petition for certiorari pending, No. 446, this Term; *United States* v. *Hoffa,* 273 F. Supp. 141, 143 (N.D. Ill.).

Thus, our prior representations to this Court that petitioner's conviction was not tainted by the overhearing of Levine's conversations remains unimpeached, even though petitioner has had an opportunity to challenge those representations at a hearing as broad as that suggested by the Justices who dissented from the original denial of certiorari (386 U.S. at 1019–1021). The court of appeals correctly held that petitioner had made no showing warranting further proceedings.

2. As pointed out by the district court (Pet. 21) and the court of appeals (Pet. 68–69), the only real issue involved in petitioner's contention concerning the inventory of Birrell's records is whether petitioner was prejudicially hindered in obtaining Birrell's checkbooks and general ledger which he had requested during trial.

At trial, defense counsel asked to inspect certain records that had been seized from Lowell Birrell. After having an opportunity to peruse the seized records counsel indicated that the records were so voluminous that he was unable to locate the records he desired, which were checkbooks and ledger sheets of Birrell and Larson (Pet. 33). Defense counsel let the matter drop there.

At the 2255 hearing the judge directed the Assistant United States Attorney to consult an inventory of the Birrell records which the government had to determine whether the checkbooks and ledger sheets which the defense wanted were in the government's possession. The Assistant United States Attorney reported to the judge that all relevant checkbooks of Birrell and Larson had been subpoenaed by the defense and produced by the government at the trial and that according to the inventory the government did not have the Birrell and Larson ledger. Moreover, at trial, the investigating agent testified that he had never seen Birrell and Larson's general ledger (R. 317) and the prosecutor represented that the government never possessed such a record. In view of these facts, and petitioner's failure to take advantage of the district judge's offer (Pet. 68) to inspect the inventory himself to determine if it contained a reference to the ledger, there is no basis for petitioner's claim that he was prejudicially denied access to these records.[6]

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[6] Petitioner's claim that at trial government counsel falsely represented that no "inventory" of Birrell's records existed is not supported by the trial transcript. It is clear that at trial defense counsel was seeking to determine if a "log" was maintained which would indicate when particular documents were removed by government counsel from the room containing the seized records (Pet. 26–27). Government counsel stated that he knew of no such "log". He made no representation as to any "inventory" of the Birrell records (R. 319). Moreover, the United States never had a complete inventory of the Birrell records, although it did make a "selectively detailed" inventory. See *United States* v. *Birrell*, 269 F. Supp. 716, 719 (S.D.N.Y.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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